Supreme Court, U.S.
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06-990

No.

IN THE

Supreme Court of the United States

MICHAEL LEE HARMS, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SHIRLEY BACCUS-LOBEL
Counsel of Record
LAW OFFICES OF
SHIRLEY BACCUS-LOBEL
A Professional Corporation
The Oaks, 2929 Carlisle
Suite 250
Dallas, Texas 75204
214.220.8460

CURRY & TAYLOR • WASH D.C. • (202) 393-4141 • USSCINFO.COM

QUESTIONS PRESENTED

1. Whether the pervasive misapplication of federal rules of evidence to exclude relevant documents and testimony which corroborated petitioner's trial testimony in this false statement prosecution deprived him of the right to trial by jury and the "meaningful opportunity to present a complete defense" secured by the Constitution's Due Process Clause of the Fifth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment.

2. Whether the admission of testimony, unrelated to voluminous documents, by a non-expert "summary" witness, with no personal knowledge of the matters at issue, is authorized by the federal rules of evidence.

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In the

Supreme Court of the United States

No. 06-___

MICHAEL LEE HARMS
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals affirmed the conviction (Jones, C.J., dissenting) but reversed and remanded for resentencing (Jones, C.J., concurring). The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 442 F.3d 367. The court treated the request for rehearing *en banc* as a petition for rehearing and denied the

petition, and also denied the petition for rehearing *en banc* (Jones, C.J., dissenting from the denial of rehearing *en banc*) (Pet. App. 27a).

JURISDICTION

The order denying Petitioner's request for rehearing *en banc*, and treating that request as a petition for rehearing and denying the petition for rehearing, was entered on October 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to a . . . trial, by an impartial jury. . . ; * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor * * * ."

> The Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law; * * * ."

Rule 602, F.R.Evid., provides:

> "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. [subject to an exception for Rule 703, relating to opinion testimony by expert witnesses]."

Rule 1006, F.R.Evid., provides: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. * * *."

STATEMENT

Following a jury trial in the Northern District of Texas, petitioner was convicted of having used the U.S. mails fraudulently to obtain workers' compensation benefits (3 counts), in violation of 18 U.S.C. 1341, and false statements in connection with the receipt of those benefits, in violation of 18 U.S.C. 1920 (3 counts). Petitioner appealed his convictions, invoking the jurisdiction of the court of appeals pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742. His convictions were affirmed by a divided panel (Jones, C.J., dissenting), but his sentence was set aside in a unanimous decision and the cause was remanded for re-sentencing. 442 F.3d 367; Pet. App. 18a-23a.

Petitioner was an air traffic controller with the Federal Aviation Administration [FAA]. He was injured on the job when his chair fell apart and collapsed. He received government workers' compensation benefits until his return to work. The allegation of fraud was based upon petitioner's submission of Department of Labor [DOL] forms (Form 1032) to its office of Workers' Compensation Programs [OWCP] (C.A. Br. at 3-5; Pet. App. 28a-39a).[1]

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[1]Excerpts from petitioner's principal brief in the court of appeals (from the Statement at pages 3-9, and from the Argument at pages 14-17) are included in the appendix.

The evidence adduced at trial showed that while receiving workers' compensation benefits, petitioner continued his involvement with a charitable enterprise, Challenge Air, with which he had been involved for many years, piloting and overseeing maintenance of the airplane but receiving no compensation, only reimbursement for expenses. The evidence also showed that he piloted on occasion, albeit without compensation, for Hall Airways in order to fulfill his pilot hour requirements and also for rehabilitation purposes. The principal of Hall became involved with Challenge Air's activities, and also made charitable contributions to Challenge at petitioner's suggestion. For a brief period at the latter stages before he succeeded in returning to work as an air traffic controller, petitioner, who occasionally piloted for IFL but deferred discussion of income until his retirement from FAA was resolved, accepted a loan from IFL's owner and used the money to retire some indebtedness (C.A. Br. 3-9; Pet. App. at 28a-34a).

The non-disclosure on the form 1032's of funds received during the period of time petitioner received workers' compensation benefits was the basis for the claim of fraud. The indictment had been amended to substitute the term "funds" for "compensation." Then, on the eve of trial, the government withdrew most of its proposed exhibits and announced that it would not try to prove that the money petitioner received was compensation for employment but merely that he had received funds. The district court overruled petitioner's objection that this shifted the burden of proof. Earlier, the court had denied petitioner's motion to dismiss on the ground that this change in the charging language of the indictment resulted in a

failure to state an offense. Petitioner challenged these rulings on appeal. The court of appeals characterized petitioner's claim as immateriality (of the alleged false statements) as a matter of law and rejected these claims of error on appeal. 442 F.3d at 372-373; Pet. App. 6a.

Chief Judge Jones, however, saw the issue differently: petitioner "reasonably contends" that OWCP was only interested in compensation, *i.e.*, receipt of funds for work performed that would potentially offset the worker's federal benefits." 442 F.3d at 381; Pet. App. 22a. The distinction was important because petitioner had received expense reimbursements from Challenge Air, and "the government never tackled [petitioner's] proof that he received only reimbursements for expenses from Challenge." 442 F.3d at 381; Pet. App. 23a.

As the dissent also observed [442 F.3d at 381; Pet. App. 22a]:

> This prosecution was brought to prove that [petitioner] was failing to report outside compensation while he received federal workers' compensation after an injury suffered on the job as an air traffic controller. It is, in my view, **a very close case**, because [petitioner] was clearly trying to steer within the letter of the reporting requirements while keeping afloat the charitable enterprise Challenge Air. His defense thus centered around the contention that he received only reimbursement of expenses that he incurred at Amber for the benefit of Challenge Air; reimbursement of expenses is not

> compensation for work performed, nor is it "volunteer work for compensation." [emphasis added]

Petitioner testified at trial about his injury, his efforts to return to work, and to a very limited extent (due to the constraints of the trial court's rulings) the FAA and DOL's knowledge that he was flying aircraft. However, the documentary evidence which would have corroborated his representations in this regard was excluded in its entirety and cross-examination about whether DOL actually reviewed or relied on the 1032 forms was excluded as irrelevant (C.A. Br. at 15-17; Pet. App. 35a-39a).

The panel majority rejected petitioner's claims of error with respect to the trial court's exclusion of his evidence, finding no abuse of discretion. 442 F.3d at 377; Pet. App. 14a-16a. The Chief Judge disagreed and dissented from affirmance of the conviction (442 F.3d at 381; Pet. App. 22a):

> **A rational jury could have found reasonable doubt about the government's case. What turned the tide, I believe, were three significant rulings.** First, the court allowed the government to prove only that [petitioner] received "funds," not compensation for work performed, from Challenge. Second, the court refused to admit numerous exhibits–other government forms–showing that [petitioner] never concealed his aviation activities from either the Department of Labor or the FAA or his treating physicians. This evidence was relevant to [petitioner's] state of

> mind when he filled out the forms at issue here. Third, the court refused to admit medical evidence concerning [petitioner's] disability, stating that it would confuse the jury and invite a verdict based on sympathy.

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit's published decision in this case conflicts with longstanding Supreme Court precedent, most recently *Holmes v. South Carolina*, 547 U.S. ___, 126 S. Ct. 1727 (2006), affirming the right of an accused to present a complete defense. The decision also conflicts with this Court's substantial body of precedent upholding the right of the accused to challenge the prosecution's case through cross-examination of its witness. *E.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004), *Davis v. Alaska*, 415 U.S. 308 (1974). A substantial impairment of these rights also abridges the right to trial by jury by excluding from the jury's consideration evidence it should have in order fairly and accurately to make the determination entrusted to it.

The issue arises in a context important to the current administration of justice. Prosecutions for false statement on government forms have skyrocketed in the past two decades. The burden of proof in such prosecutions is considerably eased to the extent that a non-contextual examination of the allegedly false document is achieved, as is increasingly the case, a phenomenon any seasoned federal criminal trial lawyer will recognize.

In this case, the two-member majority affirmed the

district court's exclusion of documentary evidence *which would have corroborated petitioner's trial* testimony that

- contrary to the government's position, there was no concealment from DOL of his piloting activities;
- he had made repeated efforts to return to work as an air traffic controller; and
- his injury was serious even though it did not prohibit his flying an airplane.

Petitioner also was foreclosed from challenging the government's claim, through a government witness' testimony, that the allegedly false statements were material. His effort on cross-examination to demonstrate that the forms were not actually relied upon or reviewed was simply squelched.

This case therefore presents a *narrow* question regarding application of the important principle articulated in *Holmes* and previous decisions of this Court. It does not augur for an unwieldy principle which would infringe upon trial court's discretion with respect to evidentiary rulings. Here, the accused testified in a false statement prosecution which relied on government forms, but was foreclosed from corroborating his testimony with unquestionably authentic (mostly government) records which were directly related to his defense. This was, as the dissent observed, "a very close case" and "[w]hat turned the tide" were the trial court's "significant rulings," including its "refus[al] to admit numerous exhibits - other government forms - showing that [petitioner] never concealed his aviation activities from either the

Department of Labors or the FAA or his treating physicians[,]" as well as "medical evidence concerning [petitioner's] disability, stating that it would confuse the jury and invite a verdict based on sympathy"[2] (442 F.3d at 381; Pet. App. 23a) (footnote added). Furthermore, the district court inexplicably constrained petitioner's cross-examination regarding those documents (the form 1032's) introduced by the government, allowing testimony that they were material and then foreclosing petitioner's attempt on cross-examination to show DOL actually had not relied on the forms at all!

In upholding the fundamental right to present a complete defense, this Court, over time, has dealt with and rejected the application of evidence rules to prevent presentation of a complete defense, most recently in *Holmes v. South Carolina*, *supra*. There, the petitioner's effort to demonstrate that a third party had instead committed the offense was improperly foreclosed on the basis of the strength of the prosecution's evidence. In *Washington v. Texas*, 388 U.S. 14, 19 (1967), the Court found that the rule which provided that accomplices were incompetent to testify *for* one another abridged the Sixth Amendment's compulsory process clause:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the

---

[2]The panel majority held that petitioner's disclosures to the FAA could not be "imputed" to the DOL. 442 F.3d at 377; Pet. App. at 15a.

> facts as well as the prosecution's **to the jury so it may decide where the truth lies.** Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. [emphasis added]

Thus, this Court stressed that the accused's fundamental right to trial by jury depends in no small measure upon the exercise of other important rights secured by the Constitution, including the rights of confrontation and compulsory process.

Edwards v. United States, 312 U.S. 473, 482 (1941), although specifically addressing a plea in bar which claimed an immunity from prosecution, explicated the truth-finding function underlying the right of an accused to present a defense:

> The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. **The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results.** The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful

> protection. Infringement of that opportunity is forbidden. [footnote omitted; emphasis added]

In other words, when a party is not permitted to complete his case, the power to decide shifts from the jury to the judge (and his predilections). But, as a matter of constitutional principle, the jury is the decision-maker. "The right [to trial by jury] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely* v. *Washington*, 542 U.S. 296 (2004). "We have always trusted juries to sort through complex facts in various areas of law." *United States* v. *Booker*, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part).

"Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guaranties criminal defendants 'a meaningful opportunity to present a complete defense.' " *Holmes v. South Carolina*, *supra*, 126 S.Ct. at 1731, citing *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479 485 (1984) (citations omitted).

That the right of compulsory process applies not merely to witnesses but also to documents has been clear since Aaron Burr subpoenaed letters sent to President Jefferson and Justice John Marshall overruled government objections to the production of mere documents. *United States v. Burr*, 25 F. Cas. 30 (No. 14692 D) (C.C.D. Va. 1807); *United States v. Burr*, 25 F. Cas. 187 (no. 14, 694) (C.C.D. Va. 1807).

While certainly courts may, consistent with

constitutional strictures, "exclude evidence that is 'repetitive . . . , only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues[,]' " *Holmes, supra*, 126 S.Ct. at 1732, citing *Crane* at 689-690 (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), the serial, erroneous, and arbitrary application of (or failure to apply) the rules of evidence is no less inimical to the principles embodied in the Sixth Amendment than was the specific rule addressed in *Holmes*. This has been clear at least since *Chambers v. Mississippi*, 410 U.S. 284 (1973), which involved application of a hearsay rule of general application.

In *Chambers*, the defendant was foreclosed by application of a "voucher" rule from impeaching a witness with hearsay, the witness' confession to the crime. This Court held that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302. *See also, Green v. Georgia*, 442 U.S. 95 (1979).

Here, petitioner was charged by the government, his employer, with mail fraud and false statement. An essential element of mail fraud, as the panel majority acknowledged, is "the specific intent to defraud." 442 F.3d at 372; Pet. App. 5a (citing *United States v. Bieganowski*, 313 F.3d 264, 275 (5th Cir. 2002). And in a prosecution under 18 U.S.C. 1920, "the Government must show that the defendant: (1) knowingly and **willfully**, (2) falsified, concealed, or covered up a material fact, or made a false, fictitious, or fraudulent statement or representation, or made or used a false statement or report knowing the same to contain any

false, fictitious, or fraudulent statement or entry, (3) in connection with the application for or receipt of compensation or other benefit or payment" (442 F.3d at 372; Pet. App. 6a (emphasis added). "Willfully" is "a word of many meanings" and its correct interpretation depends upon its context, to be sure. *Bryan v. United States*, 524 U.S. 184, 191 (1998) (quoting in part *Spies v. United States*, 317 U.S. 492, 497 (1943)). Whatever may be the precise meaning of "willfully" in this statutory context, it unquestionably is a strong mental element rightfully requiring a searching examination of an accused's intent. *E.g., United States v. Pomponio*, 429 U.S. 10, 12 (1976); *Ratzlaf v. United States*, 510 U.S. 135 (1994). No such searching inquiry can occur in a non-contextual examination of a government form. Yet, a non-contextual examination of the form was the government's acknowledged goal in this prosecution, and that goal was largely achieved.

The trial court's rulings excluding relevant, intrinsic evidence constituted error which infringed upon petitioner's right to have the jury determine his fate after presentation of a complete defense. He was prevented from fully demonstrating the extent of the injury which was the basis for his workers' compensation claim. Unable to tell the full story and place his conduct in context, as the law not merely permits but requires, petitioner was unable fully to defend himself. Serious injury or disability and flying airplanes are counterintuitive and yet even permanently disabled persons fly aircraft. It was therefore particularly important that petitioner demonstrate that his disability was real.

The government was also allowed to suggest that

petitioner concealed his flying activities, and he was not permitted to counter this suggestion with documentary corroboration of his disclosure of those activities to the doctors who treated and evaluated him and who in turn routinely disclosed such information to DOL. An activity which is known, even open and notorious, is hardly consistent with a claim of concealment.

After petitioner was injured, he was told he should retire on permanent, total disability, but he was determined to return to work and used aircraft flying as a means of rehabilitation, as well as a means to accumulate his requisite pilot hours. But petitioner was foreclosed from telling the full story of his efforts to return to work at the FAA, efforts both logically inconsistent with a scheme to defraud and reflective of a state of mind which does not comport with the specific intent to defraud which was an essential element of these offenses. After all, one engaged in a scheme to defraud does not ordinarily try to dismantle the infrastructure which sustains the scheme. Yet, this is precisely what petitioner sought to do - return to work which, of course, would end his workers' compensation benefits.

Petitioner was prepared to show that he lacked any intent to deceive and that the answers on the forms were neither false, nor material because his employer, the FAA, was fully aware of his flying as were his doctors and, indeed, the DOL. The trial court inexplicably and repeatedly sustained the government's objections to the introduction of evidence imputing knowledge of petitioner's activities to these agencies. When petitioner attempted to introduce relevant, admissible, and necessary evidence which would have

established a defense – evidence which would have illustrated his constant and faithful efforts to return to work – the court rejected it.

"All relevant evidence is admissible . . ." [Rule 402, F.R.Evid.] unless some compelling basis for its exclusion is shown. Rule 403, F.R.Evid. Other than the prosecution's desire to have the allegedly false forms evaluated in a vacuum, there was no reason for the exclusion of appellant's proffered evidence. The extent of his injury was very important, given the government's reliance on his flying activities to suggest that he was not really disabled. His attempt to go back to work revealed the opposite of a scheme to defraud, for once he returned to work the alleged fraud would cease. The claimed materiality of the forms could hardly withstand scrutiny if, in reality, no attention was paid to them. And disclosure of his flying activities to doctors who routinely report to DOL contradicts the government's allegation of concealment.

Furthermore, intrinsic evidence – and surely the medical evidence concerning the very injury at issue in the subject WC claim, the FAA and DOL's knowledge of his flying, and his efforts to return to work are intrinsic to the WC claim at issue – is admissible. It provides the "context of events" "so that the fact finder may evaluate all the circumstances under which the defendant acted." *United States v. Walters*, 351 F.3d 159 at n..2 (5th Cir. 2003), citing *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996), and *United States v. Royal*, 972 F.2d 643, (5th Cir. 1992). See, also, *United States v. Griffin*, 324 F.3d 330, 360 (5th Cir. 2003); *United States v. Navarro*, 169 F.3d 228, 233 (5th Cir. 1999); *United States v. Garcia*, 27 F.3d 1009, 1014

(5th Cir. 1994).

The arbitrary and unfounded application here of evidentiary rules to constrain so severely the right to present a complete defense and fully to exercise the right to trial by jury is consistent with a growing prosecutional trend aimed at achieving the non-contextual examination of allegedly fraudulent documents. The published decision of the panel majority promotes that unworthy goal. This Court should hear this case in order to address these important issues and an unfortunate and growing phenomenon hostile to the right of an accused to present a complete defense.

This federal criminal trial fell below minimal constitutional standards of compulsory process, confrontation, due process, and indeed simple fairness. We recognize that error, even pervasive error, does not alone warrant this Court's attention. Where, however, serious and pervasive error rests upon repeated misapplication of the federal rules of evidence to exclude a defendant's efforts to make his case and corroborate his testimony, and meaningfully to challenge the prosecution's evidentiary claims with respect to the essential elements (e.g., materiality), review is warranted in order to uphold the important right to present a complete defense.

"Here the district court apparently excluded the bulk of [petitioner's] evidence on grounds of relevancy." 442 F.3d at 376; Pet. App. 14a. This serial misapplication of the federal rules of evidence is every bit as deplorable as were the wrongly applied State rules of evidence in *Holmes, Chambers, and Washington v. Texas.*

Petitioner was required to challenge his government (indeed, his employer) with his hands tied behind his back. He could claim the FAA and DOL knew he was flying; he could assert that his medical condition involved serious injury in nowise inconsistent with piloting; he could insist that he made repeated efforts to return to work; and generally claim good faith and innocent intent. But he was not permitted to corroborate those claims with documentary evidence. Nor was he permitted to challenge his employer's claim of materiality by efforts on cross-examination to reveal that there was no actual reliance upon or review of the forms which were alleged to have contained false statements. These circumstances and the implications for the federal system of criminal justice warrant review by this Court.

2. The court of appeals' decision also contravenes the Federal Rules of Evidence and endorses a practice which undermines the truth-finding function in federal criminal trials.

The current use of the summary witness in federal **criminal** trials represents considerable backsliding from the reliability which the personal knowledge requirement of Rule 602, F.R.Evid. is designed to assure. Needless to say, it impinges as well upon the interests secured by the Confrontation Clause, for it is difficult indeed meaningfully to cross examine a witness with no personal knowledge concerning the events he has been called upon to relate to the jury.

For some period of time, federal district and appellate courts have ignored the constraints of Rules 602 and 1006 by permitting, fairly routinely, testimony by persons with **no personal knowledge** about the

matters on trial. F.R. Evid. Rule 602 requires that any witness (other than an expert) have personal knowledge of the matter concerning which she testifies. A so-called "summary" witness may testify at trial but only to present the contents of "voluminous writings, recordings, or photographs which cannot conveniently be examined in court." Rule 1006.

Here, the government's case-in-chief was presented in less than two days by four witnesses in addition to the "summary" witness (an employee of the U.S. Attorney's office) whose "testimony summarized the Government's evidence relating to [petitioner's] receipt of funds from Charter [sic] Air, Amber Aviation, Hall Airlines and IFL, * * * [and] explained the contents of the time-line [chart]." 442 F.3d at 376; Pet. App. 12a-13a.[3]

As stated, Rule 602 prohibits testimony by a person who has no personal knowledge of the events at issue, except for experts. Rule 703. So-called "summary" evidence is permitted by the rules solely to summarize the contents of voluminous materials which cannot conveniently be examined in court. Rule 1006. Notwithstanding these clear constraints, the vanishing

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[3]The DOL witness presented by the government had no personal knowledge of the workers' compensation claim and little familiarity with the file. DOL witnesses who had processed the claim were not called as witnesses by the government. One FAA witness, the person with the greatest familiarity with the claim and who knew DOL knew about petitioner's piloting activities, was called by the defense, although much of her testimony was restricted. The Challenge Air witness had not been employed there during much of the relevant time period. The two witnesses from Hall and IFL did have personal knowledge about the matters at issue.

federal criminal trial[4] all too often includes presentation by the government of a "summary" witness who recounts trial evidence and/or discusses documents without any of the perils cross examination and challenges to credibility present for persons with actual knowledge of the matters at issue in the trial. Some have called such summary testimony "closing argument under oath." Others point out that is permits a well-spoken and highly presentable government agent or employee to "pitch" the government's case even though the person lacks any personal knowledge and therefore **is not** a witness.

The unfortunate and recurring use by prosecutors of summary witnesses is inimical to the "criminal justice system's truth-finding function." *United States v. Leon*, 468 U.S. 897, 907 (1984).

The panel here ignored the above limitations imposed by federal rules, stating instead [442 F.3d at 376; Pet. App. at 13a]:

> After reviewing the Government's exhibits and Hager's testimony, we believe the district court did not abuse its discretion in permitting Hager's summary testimony. The evidence at issue presented an appreciable degree of complexity and the district court gave a limiting instruction to the jury. * * * The time-line and Hager's testimony were supported by other evidence and we find neither to have been inconsistent with the other evidence presented.

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[4] "The Vanishing Trial," *ABA Journal*, Vol. 88 at 24 (October 2002).

[internal citations omitted]

This latter observation bears repeating: the panel bootstrapped its conclusion that the "summary" was appropriate by noting that the "summary" witness' testimony was supported by other evidence. But the testimony of a summary witness is not evidence. How could it be? It merely recounts evidence. It reviews evidence. Such testimony lacks an essential foundation, personal knowledge. And, yet, when - as here - the very presentable government "summary" witness testifies, that testimony becomes evidence to the jury (as it did for the circuit judges here), even though it is no such thing.

As Professors Wright and Gold have observed:

> In terms of substance, [Rule 602] embodies one of the most fundamental tenets of a rational system of evidence law; testimony should be reliable and, thus, must be based on the perceptions of the witness rather than conjecture or second-hand information. [footnote omitted]

Wright and Gold, Federal Practice and Procedure: Evidence § 6021 at page 187 (1990 ed.). "In terms of history, the personal knowledge requirement is one of the best established of evidentiary principles, with roots in medieval law." *Id.* (footnote omitted).

This case is a paradigm of the unauthorized use of a summary witness. There were no voluminous records. The government's presentation of evidence consisted of four (4) witnesses and lasted less than two days. The

unauthorized and undesirable practice of using summary witnesses in criminal cases, particularly in view of the impact upon the accused's right of confrontation, is an issue of fundamental importance to the administration of justice which warrants review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHIRLEY BACCUS-LOBEL
(Counsel of Record)
LAW OFFICES OF
SHIRLEY BACCUS-LOBEL
A Professional Corporation
The Oaks, 2929 Carlisle
Suite 250
Dallas, Texas 75204
214.220.8460

(any footnotes trail end of each document)

No. 04-10631
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL LEE HARMS,
Defendant-Appellant.

March 6, 2006, Filed

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Lynn V Hastings, Assistant US Attorney, US Attorney's Office, Northern District of Texas, Dallas, TX.

For MICHAEL LEE HARMS, Defendant - Appellant: Stephen Cass Weiland, Robert Allen Hawkins, Patton Boggs, Dallas, TX.

JUDGES: Before JONES, Chief Judge, and DAVIS and GARZA, Circuit Judges. EDITH H. JONES, Chief Judge, concurring in part and dissenting in part.

OPINION BY: EMILIO M. GARZA

OPINION: EMILIO M. GARZA, Circuit Judge:

A jury convicted Michael Lee Harms of three counts of mail fraud and three counts of perjury in connection

with the receipt of workers' compensation benefits. The district court sentenced him to 33 months imprisonment and ordered restitution of $ 354,389.61. Harms's appeal challenges the sufficiency of the indictment and the evidence against him, the prosecution's use of summary evidence, exclusion of defense evidence, and the denial of his motion for mistrial. He also appeals his sentence.

I

Harms suffered a back injury in 1996 while employed by the Federal Aviation Administration (FAA) as an air traffic controller. Unable to return to work, he began receiving workers' compensation benefits from the Office of Workers' Compensation Programs, an office of the Department of Labor (DOL). Except during an unsuccessful attempt to return to work in 1997, Harms continued to receive benefits until he returned to work in February 2002. As required by federal regulation, Harms periodically provided to the DOL a "Form 1032," a questionnaire regarding a recipient's employment, business, and related activities. These forms instructed Harms to disclose, among other things: (1) all employment for which he received a salary, wages, income, sales commissions, piecework, or payment of any kind; (2) all self-employment or involvement in business enterprises, including managing or overseeing a business of any kind; (3) any work or ownership interest in any business enterprise, even if the business lost money or performed duties for which he was not paid; (4) and any volunteer work for which any form of monetary or in-kind compensation was received. The forms cautioned that false or evasive answers might result in forfeiture of compensation benefits, civil liability, and criminal prosecution.

While receiving workers' compensation benefits, Harms served on the board of directors for Challenge Air for Kids ("Challenge Air"), a non-profit organization. He also served as president, chief executive office, and part owner of Amber Aviation, Inc. ("Amber Aviation"), a for-profit corporation closely associated with Challenge Air. Harms also flew planes for IFL Group ("IFL") and Hall Airways, Inc. ("Hall Airways"), two charter airline companies. He failed to disclose any of these activities on the 1032 forms he submitted to the DOL.

In 2003, Harms was charged with three counts of mail fraud, a violation of 18 U.S.C. § 1341,[1] and three counts of perjury for the purpose of obtaining workers' compensation benefits, a violation of 18 U.S.C. § 1920,[2] based on 1032 forms Harms submitted to the DOL via the United States Postal Service in 1999, 2000, and 2001.

A jury convicted Harms on all six counts. The presentence report (PSR) calculated the amount of loss for sentencing purposes as $ 354,389.61, the amount paid to Harms between February 1997 and March 2002. The PSR also increased Harms's offense level for obstruction of justice, finding that Harms had concealed or destroyed subpoenaed documents and instructed others to do likewise. The jury made no factual findings regarding amount of loss or obstruction of justice. Harms objected to the loss calculation, the obstruction of justice enhancement, the amount of restitution, and the use of the 2003 edition of the Sentencing Guidelines. The district court overruled these objections and sentenced Harms to 33 months imprisonment, the bottom of the applicable Guideline range, and ordered restitution of benefits received.

II

Harms claims that the superseding indictment[3] was deficient. In the mail fraud counts, the indictment alleged that Harms engaged in a scheme to defraud the government by working as a pilot for Hall Airways, having Hall Airways give checks to Challenge Air in the amount of his pay, and having Challenge Air pay funds to the defendant. The indictment further alleged that Harms worked for IFL and had IFL's owner pay him in a lump sum, which Harms endorsed over to his father so that his father could send funds in the same amount to pay Harms's credit card bill. Finally, the mail fraud counts alleged that Harms served on the board of Challenge Air and as president and CEO of Amber Aviation and failed to disclose any of these facts in the 1032 forms he mailed to the DOL. Similarly, in the perjury counts, the superseding indictment alleged that Harms "falsified, concealed and covered up his true employment status, involvement in business enterprises of volunteer work for compensation" in the 1032 forms. Specifically, the indictment alleged that Harms failed to disclose in his 1999 and 2000 forms that: (1) he was employed as a pilot at Hall Airways; (2) acted as president and CEO of Amber Aviation; (3) was a member of the Challenge Air board of directors; and (4) received funds from Challenge Air and Amber Aviation. With respect to the 2001 form, the indictment additionally alleged that Harms failed to disclose that he was an employee of IFL. Harms contends that the indictment fails to state an offense for either mail fraud or perjury because it alleges that he received "funds" from Charter Air and Amber Aviation rather than alleging that he received "compensation."[4] Thus, he argues, the indictment effectively shifted the burden to

him to prove that the funds he received were "reimbursements" rather than compensation.

We review the sufficiency of an indictment *de novo*. United States v. Kay, 359 F.3d 738, 742 (5th Cir. 2004). "An indictment is sufficient if it contains the elements of the charged offense, fairly informs the defendant of the charges against him, and ensures that there is no risk of future prosecutions for the same offense." *United States v. Sims. Bros. Constr., Inc.*, 277 F.3d 734, 741 (5th Cir. 2001). We are not concerned with whether the indictment could have been better framed, or whether it invokes a particular "ritual of words," but whether it conforms to the minimal standards required by the Constitution. *United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989). Thus, an exact recitation of an element of the charged crime is not required, provided the indictment as a whole "fairly imports" the element. *Id.*

To prove the offense of mail fraud under § 1341, the Government must show "(1) a scheme to defraud; (2) use of the mails to execute that scheme; and (3) the specific intent to defraud." *United States v. Bieganowski*, 313 F.3d 264, 275 (5th Cir. 2002). The Government must also prove that the scheme to defraud involved a materially false statement. *Id.* A statement is material if its has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed. *United States v. Brown*, 303 F.3d 582, 601 (5th Cir. 2002) (citing *United States v. Gaudin*, 515 U.S. 506, 509, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)).

To prove that the offense of perjury for purposes of fraudulently obtaining federal workers' compensation

benefits, the Government must show that the defendant: (1) knowingly and willfully, (2) falsified, concealed, or covered up a material fact, or made a false, fictitious, or fraudulent statement or representation, or made or used a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry, (3) in connection with the application for or receipt of compensation or other benefit or payment. 18 U.S.C. § 1920. Like mail fraud, a perjury charge under § 1920 requires a showing of materiality. *See United States v. Henry*, 164 F.3d 1304, 1308 (10th Cir. 1999) (considering, in an appeal from a conviction under § 1920, whether the government had proven that the defendant's false statements were material).

Harms's argument appears to be that the misstatements alleged by the Government are immaterial as a matter of law and that the superseding indictment thus fails to allege a necessary element of the crimes for which he was charged -- material misstatements. We decline to find the superseding indictment constitutionally deficient. Whether a misstatement is material is generally an issue of fact for the jury to decide. *See United States v. Ferro*, 252 F.3d 964, 968 (8th Cir. 2001) (stating that materiality is an issue for the jury and that "so long as the indictment contains a facially sufficient allegation of materiality, federal criminal procedure does not provide for a pre-trial determination of sufficiency of the evidence." (quotation omitted)); *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) ("unless no reasonable mind could find a statement or omission to be material, criminal trial must submit the issue to the jury") (citing *Gaudin*, 515 U.S. at 511).

The 1032 forms Harms completed require wide-ranging disclosure. The instructions require disclosure of "ALL self-employment or involvement in business enterprise." This includes "managing and/or overseeing a business of any kind." Recipients must also disclose "ANY work or ownership interest in any business enterprise." Even if the recipient was not paid for those duties, he or she "must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties." In addition to such employment, recipients must disclose "any volunteer work for which ANY FORM of monetary or in-kind compensation was received." In view of the extensive disclosures required by the 1032 forms, the indictment in this case alleges a collection of facts that, at least on their face, might be material. With respect to the August 1999 and March 2000 1032 forms, the perjury counts of the indictment allege that Harms failed to disclose the following "material facts": (1) that he was employed as a pilot at Hall; (2) acted as president and chief executive office of Amber Aviation; (3) was a member of the Challenge Air Board of Directors; and (4) received funds from Challenge Air and Amber Aviation. With respect to the 1032 form Harms filed in March 2001, the indictment alleges that Harms omitted the same material facts, as well as his employment as a pilot by IFL. These counts further incorporate the mail fraud counts' allegations. The indictment alleges that these facts were material because "form 1032 required that information provided be truthful and complete and further required disclosure of any employment, self-employment, volunteer work for payment and any involvement in a business enterprise."

The Government has met its burden of identifying the facts it claims were material and alleging why those facts were material. *Cf. United States v. Pirro*, 212 F.3d 86, 93 (2d Cir. 2000) (holding that an indictment failed to sufficiently allege a material falsehood or omission amounting to a material falsehood because the indictment failed to allege what facts made the omission material). Contrary to Harms's assertion, the burden of proof to show the materiality of the facts alleged in the indictment remained with the Government. Whether or not that burden was satisfied is a question of evidentiary sufficiency, discussed in part III, *infra*. Because a reasonable jury could find the omissions alleged by the indictment to be material, we hold that the indictment sufficiently alleged materiality and therefore met the minimum standards required by the Constitution.

III

Harms also argues that the evidence produced by the Government is insufficient to sustain his convictions. Harms's sufficiency of the evidence challenge essentially reframes his insufficient indictment claim, claiming that the Government failed to satisfy its burden on the issue of materiality. Specifically, he contends that the Government failed to prove that his failure to disclose his involvement with Challenge Air, Amber Aviation, Hall Airways, and IFL were material facts.

In assessing a challenge to the sufficiency of the evidence in a criminal trial, we ask whether, viewing the evidence in the light most favorable to the Government, a reasonable trier of fact could find that

the evidence establishes guilt beyond a reasonable doubt. *United States v. Villarreal*, 324 F.3d 319, 322 (5th Cir. 2003). "All reasonable inferences must be drawn, and all credibility determinations made, in the light most favorable to the verdict." *Id.* "The evidence need not exclude every reasonable hypothesis of innocence and the jury is free to choose among reasonable interpretations of the evidence." *United States v. Brugman*, 364 F.3d 613, 615 (5th Cir. 2004) (citing *United States v. Perrien*, 274 F.3d 936, 939-40 (5th Cir. 2001)).

After carefully reviewing the record in this case, we are satisfied that, viewing the evidence in the light most favorable to the Government, a reasonable trier of fact could conclude that the Government proved beyond a reasonable doubt that Harms concealed material facts. Joshua Hall, the former president of Hall Airways, testified that Harms agreed to work for him as a contract pilot in 1998. Hall testified that Harms told him he was not able to receive income because he was "on disability," and asked Hall to donate what would have been his pay to Challenge Air and Amber Aviation.[5] Hall testified that he would not have written the checks but for Harms's work for the company. It is uncontested that Harms served on the board of directors of Challenge Air and as president and chief executive officer of Amber Aviation and received payments from both. The Government also introduced evidence that Harms received 25 hours of free flying time on the Amber airplane and reimbursement for expenses incurred in connection with his activities. Harms's forms also did not show what it would have cost to hire someone to perform the work done by Harms.

IFL president Michael Church testified that Harms was an IFL employee. He testified that Harms told him he was retiring from the FAA and could not accept any compensation until after his paperwork was final, but that Harms did not tell him of his disability. Church testified that there was an agreement that Harms would start receiving pay after his retirement became effective. Church also testified that he made a "loan" to Harms, but did not expect to get the money back, that he would not have given Harms more than he had earned as pay, and that he always intended that Harms receive the money that he had earned as a pilot. Martha Wale, vice-president of IFL, testified that IFL paid Harms $ 13,000 on October 1, 2001 and that, at the time, Harms was owed approximately $ 13,365 in salary. Wale also testified that she did not consider the payment a loan and did not expect it to be repaid. The Government also introduced evidence that Harms received a $ 13,000 check from IFL and endorsed the check over to his father, Gerald Harms, who then wrote a check for $ 13,000 payable to his son's (Harms's) credit card account.

Frances Memmolo, district director of the Division of Federal Employees' Compensation in Dallas, Texas, testified about the DOL's use of 1032 forms, stating that affirmative answers to the questions on the 1032 form result in the claims examiner conducting a more thorough investigation of the case. Memmolo further testified that the DOL does not have the resources to verify the answers on the 1032 forms, and that recipients are therefore warned on the forms that they "are supposed to be reporting the truth and we have to accept what they tell us." Finally, Memmolo testified that affirmative answers to the 1032 forms questions

could result in changes to the recipient's status. Considering the evidence produced at trial, including Memmolo's testimony and the terms of the 1032 forms themselves, and drawing all reasonable inferences in favor of the Government, a reasonable trier of fact could conclude that Harms failed to disclose material information as charged in the superseding indictment.

IV

Harms also claims that the district court erred by admitting a time-line chart comparing the dates and payments Harms received to the dates of Harms's 1032 forms and Harms's activities while receiving benefits, along with the accompanying testimony of Government witness Tom Hager. Admission of evidence, including summaries and summary testimony, is reviewed for abuse of discretion. *United States v. Buck*, 324 F.3d 786, 790 (5th Cir. 2003). An error in the admission of evidence is excused "unless it had substantial and injurious effect or influence in determining the jury's verdict." *Id.* "The admission of organization charts and summary evidence is governed by Federal Rules of Evidence 611(a) and 1006." *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000). "Allowing the use of charts as 'pedagogical' devices intended to present the government's version of the case is within the bounds of the trial court's discretion to control the presentation of evidence under Rule 611(a)." *Id.* "Such charts are not admitted into evidence and should not go to the jury room absent consent of the parties." *Id.* If a summary or chart is introduced solely as a pedagogical device, the court should instruct the jury that the chart or summary is not to be considered as evidence, but only as an aid in evaluating evidence. *Buck*, 324 F.3d at 791.

"In contrast, Rule 1006 applies to summary charts based on evidence previously admitted but which is so voluminous that in-court review by the jury would be inconvenient." *Taylor*, 210 F.3d at 315. "For complex cases, we have [also] allowed summary witnesses in a limited capacity." *United States v. Fullwood*, 342 F.3d 409, 413 (5th Cir. 2003). We have cautioned, however, that "while such witnesses may be appropriate for summarizing voluminous records . . . rebuttal testimony by an advocate summarizing and organizing the case for the jury constitutes a very different phenomenon, not justified by the Federal Rules of Evidence or our precedent." *Id.* at 414.

Prior to trial, the Government offered the time-line under Rule 1006. Harms objected to its admission into evidence, but not to its use for demonstrative purposes. The court stated that it would allow the exhibit to be used for demonstrative purposes. The court later instructed the jury as follows: "You'll recall that certain charts and summaries were received as demonstrative evidence. Charts and summaries are valid only to the extent that they accurately reflect the underlying supporting evidence." Although the court's reference to "demonstrative evidence" is imprecise, the record shows that the time line was never admitted into evidence or allowed into the jury room. Further, when the jury asked if it could use the time line, the court replied that the summary was not in evidence and was "only for demonstrative purposes."

Hager's testimony summarized the Government's evidence relating to Harms's receipt of funds from Charter Air, Amber Aviation, Hall Airways, and IFL. His testimony also summarized evidence that Harms

received a $ 13,000 check from IFL and endorsed the check over to his father, Gerald Harms, who then wrote a check for $ 13,000 payable to his son's VISA account. Finally, Hager explained the contents of the time-line.

After reviewing the Government's exhibits and Hager's testimony, we believe the district court did not abuse its discretion in permitting Hager's summary testimony. The evidence at issue presented an appreciable degree of complexity and the district court gave a limiting instruction to the jury. *Cf. United States v. Okoronkwo*, 46 F.3d 426, 435 (5th Cir. 1995) (use of summary witness not reversible error where merely cumulative of substantive evidence); *United States v. Winn*, 948 F.2d 145, 157-58 (5th Cir. 1991) (use of summary chart and testimony not reversible error where prejudice neutralized by instruction). The time-line and Hager's testimony were supported by other evidence and we find neither to have been inconsistent with the other evidence presented. *Cf. Buck*, 324 F.3d at 791 (holding admission of pedagogical chart into evidence to be harmless where the chart was supported by and accurately summarized other evidence). Finally, we are not persuaded that Hager's testimony implicates the concerns we expressed in *Fullwood* about the use of summary testimony as "rebuttal testimony by an advocate summarizing and organizing the case for the jury . . . [or] a substitute for, or a supplement to, closing argument." *Fullwood*, 342 F.3d at 414. Harms has failed to show an abuse of discretion or a violation of his substantial rights in the use of the time-line or admission of Hager's testimony.

V

Harms also claims that the district court erred in excluding defense exhibits and in limiting cross-examination relating to his injury, the DOL's reliance on his statements, and the FAA's and DOL's knowledge that he was piloting airplanes. He concedes that the court permitted him to testify regarding each of these facts, but claims that the exclusion of documentary evidence supporting his testimony was nonetheless prejudicial. The district court apparently excluded the bulk of this evidence on grounds of relevancy. Harms contends that evidence concerning his injury was relevant because it would have provided a "context of events" for the jury to evaluate his actions. He also argues that evidence of his efforts to return to work was relevant to whether he intended to defraud, and that his disclosure of his flying activities to doctors who provided reports to the DOL contradicted the Government's allegation of concealment.

We review the exclusion of evidence for abuse of discretion. *Buck*, 324 F.3d at 790. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Rulings limiting the scope or extent of cross-examination are also committed to the sound discretion of the trial court. *United States v. Barksdale-Contreras*, 972 F.2d 111, 115 (5th Cir. 1992). "If we find an abuse of discretion in admitting or excluding evidence, we next review the error under the harmless error doctrine, affirming the judgment unless the ruling affected the substantial rights of the complaining party." *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584 (5th Cir. 2003).

The district court did not commit reversible error in excluding evidence relating to the extent of Harms's injuries and Harms's rehabilitation efforts. Even if Harms's evidence met the minimum threshold of relevancy, its exclusion was harmless because it could not have affected the jury's determination any of the charged counts. *Cf. United States v. Tucker*, 345 F.3d 320, 326-27 (5th Cir. 2003) (" the necessary inquiry is whether the trier of fact would have found the defendant guilty beyond a reasonable doubt with the additional evidence inserted"). The jury was not required to determine whether Harms actually suffered an injury or the extent of that injury, or artificially prolonged his absence from work, but whether he engaged in a scheme to defraud by concealing material information in the 1032 forms submitted to the DOL. Harms's evidence regarding a tangential fact could not have affected the jury's verdict in this case. Neither did the court commit reversible error in excluding evidence of what FAA employees knew about Harms's activities. Generally, "notice or actual knowledge of one United States government agency will not be imputed to another agency." *United States Small Bus. Admin. v. Bridges*, 894 F.2d 108, 112 (5th Cir. 1990).[6]

Harms has also not shown reversible error in the exclusion of doctors' reports referencing Harms's flying during the period he was collecting workers' compensation benefits. The June 1999 report mentions in passing only that Harms was "able to fly in the right seat but is not doing any left-seat flying." A January 2001 letter states that he was working as a pilot on a volunteer basis. Even if this evidence was relevant to his intent, Harms has not shown reversible error. The trial court permitted Harms to testify both that he told

his doctors about his flying and that he believed the doctors were forwarding that information to the DOL. We are not persuaded that the exclusion of these reports violated his substantial rights notwithstanding his testimony to the same effect.

Harms also contends that the trial court erred in denying his motion for mistrial after the prosecutor stated during closing rebuttal that "there's no evidence whatsoever of a broken back." Harms objected to the remark after the conclusion of closing argument and out of the jury's presence. He is entitled to relief "only if he can show, in the context of the trial, that the remarks amounted to plain error." *See United States v. Caucci*, 635 F.2d 441, 448 (5th Cir. 1981). To establish plain error, he must show that the error is clear or obvious and that the comments, "taken as a whole in the context of the entire case, substantially prejudiced [his] rights." *United States v. Montemayor*, 684 F.2d 1118, 1124 (5th Cir. 1982). "Plain error may be recognized only if the error is so obvious that the failure to notice it would seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice." *Id.* (internal quotation omitted). Harms makes no argument under the plain-error standard. While the prosecutor's statement appears to have been neither warranted nor relevant, Harms has not shown that a comment on an essentially irrelevant matter substantially prejudiced his rights or resulted in a miscarriage of justice.

VI

Finally, Harms appeals his sentence. Renewing objections made before the district court, he claims that

the court erred by (1) imposing a sentencing enhancement for obstruction of justice; (2) miscalculating the amount of loss for sentencing purposes and the amount of restitution; and (3) applying the 2003 rather than the 2000 version of the Sentencing Guidelines.

A

Harms argues that the increase for obstruction of justice was unsupported by the facts. We review the district court's factual findings with respect to sentencing under the Guidelines for clear error. *United States v. Villanueva*, 408 F.3d 193, 203 n.9 (5th Cir. 2005) ("Post-*Booker*, we continue to apply the same standard of review to claims of erroneous fact-finding with respect to the application of adjustments, i.e., we review for clear error." (citations omitted)). There is no clear error if the district court's finding is plausible in light of the record as a whole. *United States v. Edwards*, 303 F.3d 606, 645 (5th Cir. 2002). We give deference to the credibility determinations of the district court. *United States v. Perez*, 217 F.3d 323, 331 (5th Cir. 2000).

Section 3C1.1 of the Guidelines provides for an increased offense level if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction." U.S.S.G. § 3C1.1(A) (2003). Trial testimony indicated that Harms concealed at least one subpoenaed document relevant to his work for Challenge Air, and that he told a Challenge Air executive to deny that the document existed and to

destroy any similar document. The PSR also reported that Harms wrote a back-dated check to IFL in order to make it appear that he was repaying a loan from IFL rather than receiving a salary. This was corroborated by testimony from Hall, who stated that Harms showed concern about the IFL money and asked him about the date when government investigators began to ask about Harms's employment. Given this evidence, the trial court's conclusion that Harms obstructed justice is plausible in light of the record as a whole. Accordingly, we find no reversible error in the sentencing increase.

B

Harms also claims that the district court: (1) violated the Ex Post Facto Clause of the Constitution by applying the 2003 version of the Sentencing Guidelines, resulting in a harsher sentence than would have been imposed under the Guidelines in effect at the time of his crimes; (2) miscalculated the amount of loss for sentencing purposes; and (3) miscalculated the amount of restitution. We do not reach Harms's Ex Post Facto claim because we find that the court incorrectly calculated the amount of loss for sentencing purposes under either version of the Guidelines.[7]

In cases involving fraud, the defendant's sentencing range under the Guidelines is calculated based on the amount of loss resulting from the fraud. "Although the determination of loss is a factual finding reviewed for clear error, the court's choice of the method by which losses are determined involves an application of the sentencing guidelines, which is reviewed *de novo*." *United States v. Deavours*, 219 F.3d 400, 402 (5th Cir. 2000). Harms claims that the district court erred in

calculating the amount of loss as the total amount of benefits Harms received during the period covered by his false statements. He contends that the amount of loss should not include any benefits to which he would have been entitled absent fraud. We agree.

In *United States v. Henry*, the Tenth Circuit, applying pre-amendment Guidelines, adopted the Government's approach, defining the amount of loss as "'the amount of the benefits obtained,' not the amount of benefits obtained minus the amount that would have been obtained if no false statement had been made." 164 F.3d 1304, 1310 (10th Cir. 1999) (quoting 18 U.S.C. § 1920). The court cited the Seventh Circuit's statement in *United States v. Brothers* that "if a claimant submits a false 1032 statement he forfeits the entire disability benefit even if he would have been entitled to a reduced benefit if he had submitted an accurate form." 955 F.2d 493, 495 (7th Cir. 1993).[8]

The Fourth Circuit rejected *Henry*'s approach in *United States v. Dawkins*, 202 F.3d 711 (4th Cir. 2000). The *Dawkins* court distinguished the amount of loss for sentencing purposes from the amount of forfeiture of benefits obtained through false statements, explaining that

even if automatic forfeiture of the entire voucher amount were required as a result of the false statement, this does not mean that the amount forfeited by a defendant constitutes a loss to the Government for guidelines purposes. Forfeiture is a penalty imposed on a criminal independent of any loss to the crime victim. As Chief Judge Wilkinson recently explained, the "procedures for forfeiture are set forth in a

comprehensive statutory framework of their own, one which is separate and apart from the sentencing guidelines."

Dawkins, 202 F.3d at 714-15 (quoting *United States v. Weinberger*, 91 F.3d 642, 644 (4th Cir. 1996)). The *Dawkins* court relied on the Fourth Circuit's previous decision in *United States v. Parsons*, 109 F.3d 1002 (4th Cir. 1997). In *Parsons*, the court reasoned that "loss" for purposes of the Guidelines was "the actual, intended, or probable loss to the victims." The loss itself (whether the actual or intended loss) is limited to the tangible economic loss of the victim." *Id.* at 1004. The court noted that amount of loss generally did not include interest accrued, and that loss is generally calculated not as the entire amount involved in the fraudulent scheme but rather as the amount paid minus the value received. *Id.* (citing, *inter alia*, *United States v. Chatterji*, 46 F.3d 1336, 1339-41 (4th Cir. 1995) (victim of fraud who received full value for his money suffered no loss)). Thus, the court concluded, amount of loss should be limited to the amount fraudulently obtained in excess of the amount to which the defendant was lawfully entitled. *Parsons*, 109 F.3d at 1005. Relying on *Parsons*, the *Dawkins* court concluded that the amount of loss should be calculated as "the difference between the amount of benefits Dawkins actually received and the amount he would have received had he truthfully and accurately completed the 1032 forms." *Dawkins*, 202 F.3d at 715.

For the reasons explained in *Dawkins* and *Parsons*, we are persuaded that the Fourth Circuit is correct in distinguishing the amount of forfeiture from the amount of loss and in calculating the amount of loss

based on the amount of excess benefits received as a result of fraud. This result appears even clearer under the 2003 version of the Guidelines applied by the district court, which contains a special guideline for cases involving government benefits providing that the "loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be." U.S.S.G. § 2B1.1(n.3(F)(ii)) (2003). For example, "if the defendant was the intended recipient of food stamps having a value of $ 100 but fraudulently received food stamps having a total value of $ 150, loss is $ 50." *Id.* Thus, we conclude that the district court misapplied the Guidelines by calculating Harms's sentence based on the total benefits received. *See United States v. Urias-Escobar*, 281 F.3d 165, 167 (5th Cir. 2002) (Guidelines commentary are given controlling weight unless plainly erroneous or inconsistent with the Guidelines). Instead, the amount of loss is the difference between the amount the defendant actually received and the amount he would have received absent the fraud.

By contrast, we reject Harms's assertion that the district court erred in ordering restitution of all the benefits Harms received. The plain language of 20 C.F.R. § 10.529(a) provides that "if an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report is required." *See also Brothers*, 955 F.2d at 495 ("If a claimant submits a false 1032 statement he forfeits the entire disability benefit even if he would have been entitled to a reduced benefit if he had submitted an accurate 1032 form."); *Dawkins*, 202 F.3d at 714-15 (distinguishing between amount of

forfeiture for purposes of restitution and amount of loss for purposes of sentencing). Thus, the district court did not err in ordering restitution of all the benefits Harms received.

VII

For the forgoing reasons we AFFIRM Harms's conviction, VACATE the sentence, and REMAND for further proceedings not inconsistent with this opinion.

CONCUR BY: EDITH H. JONES (In Part)

DISSENT BY: EDITH H. JONES (In Part)

DISSENT: EDITH H. JONES, Chief Judge, concurring in part and dissenting in part:

This prosecution was brought to prove that Michael Harms was failing to report outside compensation while he received federal workers' compensation after an injury suffered on the job as an air traffic controller. It is, in my view, a very close case, because Harms was clearly trying to steer within the letter of the reporting requirements while keeping afloat the charitable enterprise Challenge Air. His defense thus centered around the contention that he received only reimbursement of expenses that he incurred at Amber for the benefit of Challenge Air; reimbursement of expenses is not compensation for work performed, nor is it "volunteer work for compensation." The Office of Workers' Compensation Programs, he reasonably contends, was only interested in compensation, i.e., receipt of funds for work performed that would potentially offset the worker's federal benefits.

Harms took the stand in his own defense, as did his retired minister father. While there was considerable competing testimony about the nature of some of the payments Harms received, the government never tackled Harms's proof that he received only reimbursements for expenses from Challenge. A rational jury could have found reasonable doubt about the government's case. What turned the tide, I believe, were three significant rulings. First, the court allowed the government to prove only that Harms received "funds," not compensation for work performed, from Challenge. Second, the court refused to admit numerous exhibits--other government forms--showing that Harms never concealed his aviation activities from either the Department of Labor or the FAA or his treating physicians. This evidence was relevant to Harms's state of mind when he filled out the forms at issue here. Third, the court refused to admit medical evidence concerning Harms's disability, stating that it would confuse the jury and invite a verdict based on sympathy. The prejudice to Harms from this refusal was compounded when the government lawyer outrageously implied, in her closing rebuttal argument, that Harms's disability was fake. There was no justification for the government's blatant attempt to poison the well in this way--unless it, too, doubted the strength of its case on the evidence before the jury.

Based on these trial errors, I would vacate the conviction and remand for a new trial. Accordingly, I respectfully dissent from the affirmance of the conviction, but I concur with the decision to remand for resentencing.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Section 1341 provides in part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . ., for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1341.

n2 Section 1920 provides:

Whoever knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a false, fictitious, or fraudulent statement or representation, or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit or payment under subchapter I or III of chapter 81 of title 5, shall be guilty of perjury . . . .

18 U.S.C. § 1920.

n3 Unless otherwise specified, all references to the indictment are to the superseding indictment.

n4 The original indictment used the word "compensation" instead of "funds" in reference to the money Harms received from Challenge Air.

n5 Hall also testified that Hall Airways paid Harms's son on several occasions to wash the company planes with "a garden hose and a bucket of water," the only time the company washed its planes. Hall made the checks out to Harms's son, but delivered them to Harms. Other testimony indicated that Harms deposited these checks into his bank account. Harms claimed he deposited the checks into his account only because his son did not have a bank account.

Hall further testified that Harms helped arrange a "jump-seat agreement" between Hall Airways and Southwest Airlines that permitted Hall Airways employees, including Harms, to fly for free on Southwest Airlines planes. Hall testified that, as a condition of such agreements, the flights must be for personal rather than business use

n6 For the same reason, the district court did not err in instructing the jury that knowledge of one government agency should not be imputed to another. "A district court has broad discretion in framing the instructions to the jury and this Court will not reverse unless the instructions taken as a whole do not correctly reflect the issues and law." *United States v. McKinney*, 53 F.3d 664, 676 (5th Cir. 1995).

n7 "A sentencing court must apply the version of the sentencing guidelines effective at the time of sentencing unless application of that version would violate the Ex Post Facto Clause of the Constitution." *United States v. Kimler*, 167 F.3d 889, 893 (5th Cir. 1999). An Ex Post Facto Clause violation occurs when application of a current Guidelines results in a harsher penalty than would application of the Guidelines in place at the time of the offense. *Id.* Post-2000 versions of the Sentencing Guidelines fold former § 2F1.1, addressing offenses involving fraud or deceit, into current § 2B1.1, addressing basic economic offenses. In at least some cases, application of § 2B1.1 would result in a harsher sentence than application of former § 2F1.1. We do not reach the Ex Post Facto issue in this case, however, because, for the reasons discussed *infra*, we hold that the district court misapplied the Guidelines in determining the "amount of loss" for sentencing purposes.

n8 This court adopted a similar position in an unpublished case, *United States v. Wheeler*, 79 Fed. Appx. 656, 2003 WL 22469741 (5th Cir. 2003). In *Wheeler*, we held that the defendants, recipients of federal disaster relief payments, "intended to receive as much disaster relief as they could, hence, they should be charged with the full amount for sentencing." 79 Fed. Appx. 656, [WL] at *7. Both *Wheeler* and *Henry* involved application of the pre-amendment Guidelines. The Guidelines were amended in 2001 to revise the special rule on determining loss in cases involving government program benefits. Accordingly, we need not express an opinion on whether *Wheeler* and *Henry* were correct at the time.

Filed: 10/18/2006
No. 04-10631
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MICHAEL LEE HARMS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

Before Jones, Chief Judge, Davis and Garza, Circuit Judges.*

Per Curiam

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing EN banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

Footnote

*Chief Judge Jones dissents from the denial of Rehearing En Banc.

No. 04-10631

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,

v.

MICHAEL LEE HARMS, Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF TEXAS DALLAS DIVISION

BRIEF FOR APPELLANT

Cass Weiland
Texas Bar No. 21081300
Robert A. Hawkins
Texas Bar No. 00796726
2001 Ross Avenue,
Suite 3000
Dallas, Texas 75201
214/758-1500
214/758-1550

Shirley Baccus-Lobel
Texas Bar No. 01488000
The Oaks
2929 Carlisle, Suite 250
Dallas, Texas 75204
(214) 220 8460
(214) 969-9060
November 3, 2004
ATTORNEYS FOR APPELLANT

***

Following a jury trial, appellant was convicted of having used the U.S. mails to fraudulently obtain workers' compensation benefits (counts 1-3), in violation of 18 U.S.C. 1341, and perjury in connection with the receipt of workers' compensation benefits, in violation of 18 U.S.C. 1920 (counts 4-6) (Vol. 1 at 90; Vol. 9).[1] He was sentenced to 33 months' imprisonment, a $640 special assessment, and three (3) years' supervised release; he was also ordered to pay restitution in the total amount of the workers' compensation received, $354,389.61 (Vol. 2 at 351; Vol. 10).

B. Statement of the Facts

Appellant served as an air traffic controller with the Federal Aviation Administration (FAA). On November 25, 1996, he was taken by ambulance to the hospital following a back injury sustained when his chair collapsed (fell apart) at work (Vol. 5 at 122-123; Vol. 7 at 109-110, 177-153; G.Ex.1). The FAA's injury compensation specialist (Metz) provided notice of his injury to the Office of Workers' Compensation Programs (OWCP), the agency of the U.S . Department of Labor (DOL) which adjudicates and administers all injured federal civilian employee workers' compensation (WC} claims (Vol. 5 at 73,104,123; Vol. 7 at 104-111; Vol. 8 at 42-44, G.Ex. 1). The notice provided a description of the event, witnesses to the event, the name and address of the initial attending physician, and the injury specialist's preliminary evaluation (G.Ex.1).
At DOL, the matter was assigned to a claims administrator (Muse) who evaluated the report and the medical information and made the determination to pay

the costs of the injury as well as compensation until, if ever, appellant was able to return to work.[2] In order for the compensation to continue, periodic medical reports are required (Vol. 5 at 62-64; Vol. 7 at 104-111). It was rare for a person totally disabled to return to work (Vol. 8 at 49). Thus, appellant's return to the job was the exception, attributable in large measure to his efforts to rehabilitate himself and to return to his job (Vol. 7 at 112, 115-116, 122, 187). The critical, if not dispositive factor determining whether an employee may return to work is clearance from the primary physician (Vol. 5 at 67-68, 107, 108; Vol. 7 at 116-118; Vol. 8 at 44-45). When the primary physician releases the person to work, DOL sends the person to another doctor for a second opinion (Vol. 8 at 45-46). In the wake of a traumatic injury, the employee receives a regular salary for 45 days and after that, if unable to return to work, two-thirds or three-fourths of his salary, depending upon whether there are dependents. The compensation is not subject to federal income tax (Vol. 5 at 64-65).

Once a year, the OWCP mails a questionnaire (a Form 1032) for the injured employee to report whether the disability is ongoing, to report earnings from employment during the previous fifteen (15) months, and to report any change in the status of the employee's dependents (Vol. 5 at 65-66, 69, 80-81, 84-85, 91-91). Appellant received and answered these questionnaires before returning to work in February of 2002. In each of the forms specified in the counts of the indictment, appellant answered that he had no earnings from employment (including self-employment) during the previous fifteen (15) months (with the exception of modest rental income) (Vol. 5 at 79-81, 93-97, 101-102;

G.Ex-2 (form mailed 7-13-99 and signed by appellant 5-2-99), G. Ex.4 (form mailed 3-6-00 and signed by appellant 3-27-00), G.Ex.5 (form mailed 3-1-01 and signed 3-26-01)).

In addition to being an air traffic controller, appellant was also a licensed pilot (Vol. at 166-167). Rick Amber, a disabled former military pilot who was injured in Vietnam when his plane crashed, founded Challenge Air for Kids (Challenge), a charity which organized events for terminally ill and disabled children, the focus of which was allowing them to fly. Appellant provided piloting and other volunteer services for Challenge and eventually served on its board of directors. He continued to do so during the period he was unable to work as an air traffic controller (Vol. 5 at 12-13, 22-25, 29-30, 189-190; Vol. 6 at 16-18,48, 67-70; Vol. 7 at 67-67-68, 70-71, 124-125, 183-184; Vol. 8 at 2-4, 9, 11-12, 15).

In 1997, Rick Amber passed away, but Challenge continued, although the board's professional volunteer membership initiated certain changes. (Vol. 5 at 21-23, 27; Vol. 6 at 18-23). During a Challenge board meeting, appellant was made president and CEO of Amber Aviation (Amber). He was elected to this "figurehead" position because he was absent from the board meeting due to surgery and the rest of the board "volunteered" him (Vol. 5 at 23; Vol. 7 at 127, 196, 223).

Rick Amber had formed Amber Aviation (a Challenge subsidiary) to own the airplane Challenge used to fly the children, believing this would create a liability shield for Challenge in the event of an accident and contemplating as well that Amber might generate revenue from activities such as flight instruction (Vol. 5

at 18-20; Vol. 7 at 127-128). On a volunteer basis, appellant oversaw maintenance of the airplane (Vol. 6 at 47; Vol. 8 at 34). Amber did not function as an entity independent of Challenge and, indeed, Amber had no business and was not distinct from the charity (Vol. 5 at 21-23; Vol. 6 at 17-18, 21, 38-39; Vol. 7 at 51, 95-97, 127-129, 146). On recommendation of one of the attorneys on the Challenge board (an aviation law specialist), Amber was being dissolved because the board determined that it did not serve to shield Challenge from liability (Vol. 5 at 18-20, 21-23, 27; Vol. 6 at 13-16; Vol. 7 at 128-129). Challenge and Amber were considered by the board and others as the same entity (Vol. 4 at 180; Vol. 6 at 48; Vol. 7 at 93-94, 96-97,154-155, 233-234, 263, 265, 271-272; Vol. 7 at 25, 37-38, 46, 51; Vol. 5 at 33-34).

Appellant received no remuneration from Challenge or Amber (Vol. 7 at 185-186; Vol. 5 at 37). The Challenge board did reimburse expenses incurred by appellant over a period of several years on behalf of Challenge and Amber (Vol. 7 at 24, 26, 31 36,40,43-45,49-50,52-54,61-63,75-76,78, 80-81,83,129-131,233-237,265-266; Vol. 8 at 33-37).

In addition to occasional flights for Challenge, appellant, principally in order to advance his rehabilitation, also sporadically flew flights which he could tolerate physically for Hall Airways (Hall), after his injury and before he was cleared to return to work as a controller for the FAA (Vol. 4 at 183; Vol. 7 at 191-192). When the owner of Hall learned appellant was a pilot and first asked him to fly, appellant told him that he was recovering from a broken back and had had to learn to walk again. At that time, appellant walked bent over and used a cane (Vol. 5 at 5; Vol. 7 at 73-74).

Appellant told Hall that if he did fly, he could not be paid because he was on disability from his job (Vol. 4 at 179; Vol. 7 at 189-191). The owner of the company testified that appellant never became an employee of Hall, never received a paycheck, and was never paid compensation in any form for flying for Hall (Vol. 5 at 5-6; Vol. 7 at 185-186). Appellant received only reimbursement for expenses incurred (Vol. 5 at 6-7, 10 - 11; Vol. 7 at 223-226). After meeting appellant, the owner of Hall also became involved in supporting Challenge (Vol. 5 at 12-13). Although appellant did not accept payment for his flights for Hall, he did suggest that Hall instead donate money to the charity, and he did so, in the total amount of $5,000.00-$6,000.00 (Vol. 4 at 180; Vol. 5 at 6).

In February 2000, appellant went to visit the FAA's injury compensation specialist (Metz), who had handled the WC claim initially, and requested to go back to work as an air traffic controller (Vol. 7 at 112, 115, 122, 192-193). The specialist spoke with both DOL, including OWCP, and the FAA air traffic control supervisors in an effort to return appellant to work, but DOL declined because appellant had not been cleared to return to work by the primary physician. The FAA specialist also advised DOL that appellant was flying airplanes and that the air traffic managers wanted appellant back at work but, again, DOL declined because he had not yet been cleared by the "medicals." (Vol. 7 at 115-121).

In late 2000 and early 2001, appellant spent considerable time in Michigan assisting a sister in caring for another sister who was disabled. During this period, he responded to a magazine advertisement for pilots and began making short flights for IFL in

Michigan and, later between Tulsa and Dallas (Vol. 5 at 191; Vol. 7 at 197-201). According to IFL's owner, appellant asked not to be paid for his services until his retirement from the FAA was complete,[3] but he (the owner) asked appellant to accept a loan and he did, although the owner also testified that he' did not expect the loan to be repaid. (Vol. 4 at 120-121, 124-125, 128, 166-168).

Appellant gave the loan check he received from IFL to his father to repay a loan from his parents for the purpose of refurbishing a house he owned and was trying to sell (Vol. 5 at 190, 193; D. Exs. 152, 153, 154, 156). His father, however, urged appellant to defer repayment of the loan to him and address instead his outstanding credit card indebtedness. Appellant agreed and therefore his father used the $13,000 check for payment on appellant's credit card bill (Vol. 6 at 4-5). Once the house sold, appellant repaid the loan from' his parents (Vol. 7 at 210). Appellant repaid the IFL loan but his check bounced because a payment which was to have covered that repayment was delayed (Vol. 4 at 130-131, 145-146, 149-150; Vol. 7 at 207-209).

***

ARGUMENT

I. THE EXCLUSION OF RELEVANT DEFENSE EVIDENCE DEPRIVED APPELLANT OF A FAIR TRIAL

A. Standard of Review

This Court reviews trial court rulings on the admissibility of proffered evidence according to the abuse of discretion standard. *E.g., United States v.*

Katz, 178 F.3d 368 (5th Cir. 1999); *United States v. Pace*, 10 F.3d 1106, 1115 (5th Cir. 1993). However, "[t]he review of erroneous evidentiary rulings in criminal trials, is necessarily heightened." *United States v Nutall*, 180 F.3d 182 (5th Cir. 1999). Moreover, because the exclusion of defense evidence may impair the fundamental right to present a defense, it is subject to constitutional constraints embodied in the Compulsory Process and the Due Process Clauses of the United States Constitution. *E.g., Taylor v. Illinois*, 484 U.S. 400, 408-409, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 298-302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Washington v Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

B. Argument and Authorities

• The court below required the parties to submit their exhibits and objections for its review prior to trial. At a pretrial hearing, the court ruled on the admissibility of exhibits -- without the benefit of hearing any evidence. Of some 160+ documentary exhibits readied for trial by appellant, the court admitted approximately twenty-six (26). This was due primarily to the court's premature and erroneous determination of relevancy in response to wholesale government objections and the government's improper use of motions in limine. (Vol. 2 at 159-166, 230-249; Vol. 3 at 12-26, 30-42,45-46,51-60).

These rulings for which appellant was permitted a running objection (Vol. 3 at 41) persisted throughout trial;

•Vol. 5 at 116-117 (appellant foreclosed from asking

whether the forms were actually reviewed or relied upon, during the cross-examination of DOL witness, who had just testified that the alleged "false statements" were material);

•Vol. 5 at 116 (appellant re-urges the pertinent medical records, D.Exs. 41-109, but the court reiterates its exclusion on grounds of relevancy);

•Vol. 5 at 192 (testimony that appellant was recuperating from back surgery at the time he flew for IFL, refused with this caveat from the court: "we're not going to decide this case on sympathy."). Vol. 7 at 7 (The court reiterates that the medical records are not admissible and also states: "I don't see the relevance of his trying to get his job back");

•Vol. 7 at 7-11 (The court concludes that it is not relevant that the FAA knew he was flying; it is only relevant if DOL knew);

•Vol. 7 at 2-5 (court instructs counsel not to inquire about appellant's work ethic);

•Vol. 7 at 5-8 (government objects that evidence of appellant's efforts to get his job back has been ruled inadmissible and is misleading , confusing and takes the jury's eyes "off the form"; court asks why it is relevant);

•Vol. 7 at 119 (court excludes Metz' memos to DOL about the WC claim as having nothing to do with the charges);

•Vol. 7 at 194-195 (objection sustained to defendant's testimony that he told the doctors he was flying and that this was reflected in the reports);

•Vol. 7 at 267 and Vol. 8 at 70-71 (testimony about medical releases to work refused **after** government has inquired about medical releases to work);

•Vol. 8 at 40-42 (court adheres to earlier rulings excluding the medical evidence, the Metz memos, and appellant's single, proferred summary exhibit, a

timeline).

The following fairly typifies the evidentiary rulings in the case:

"Q. And every year don't they -- don't they fill out a little checklist every year to indicate that they have received the form?
A. The 1032?
Q. Yes, ma'am.
A. They are supposed to make sure that they have one returned every year.
Q. Okay. And do they know whether such checklists were executed in this case?
A. I don't have any direct knowledge of it, no.
Q. Would -- would that checklist typically also indicate whether the claims examiner had current medical information on file? [GOVERNMENT COUNSEL]: Your Honor -- excuse me -- may we approach the bench?
(Discussion at the bench with all counsel present.)
[GOVERNMENT COUNSEL]: The checklist that he's referring to has been excluded by the court. He's offered it previously and the court has excluded it.
THE COURT: Which exhibit?
[DEFENSE COUNSEL]: There's one -- there's three of them. THE COURT: Did I exclude them?
[DEFENSE COUNSEL]: But I was just asking her some questions about what they're used for.
THE COURT: It's been excluded. I don't understand what all this is about. I -- I am close to instructing the jury most of your questions have had nothing to do with this lawsuit.
[DEFENSE COUNSEL]: If they won't let him come back to work -THE COURT: What's that got to do with

whether he lied or not? [DEFENSE COUNSEL]: He was trying to came back to work.
THE COURT: What's that got to do with whether he lied, whether he filed a false statement?
[DEFENSE COUNSEL]: Because it's not material. They knew he was trying to come back to work. They knew he was flying -
THE COURT: I don't follow that. I don't follow that. At any rate - [DEFENSE COUNSEL]: Could I ask her if the file indicates that they knew that he was flying airplanes?
[GOVERNMENT COUNSEL]: That's also been excluded by the court.
THE COURT: I don't remember whether it was excluded but I don't know what it's got to do with anything.
[DEFENSE COUNSEL]: Because, judge, if -- if -- if he -- if they knew he was flying and they didn't make any -- any inquiry, then it wasn't material that he was flying. A handicapped person can fly an airplane, and the jury needs to hear that.
THE COURT: I still don't see what that has to do with what he's charged with here, so, no, I'll refuse that.
You can have your exception.
[GOVERNMENT COUNSEL]: May we have an instruction to defense counsel not to refer any further in front of the jury to items that have been excluded by the court?
THE COURT: Well, he'll follow that." (Vol. 5 at 117-120).

Although appellant was permitted to testify about his injury, his efforts to return to work, and to a very limited extent the FAA and DOL's knowledge that he was flying aircraft (Vol. 7 at 177-153, 193-194), the

documentary evidence which would have corroborated his representations in this regard was excluded in its entirety (e.g., Def. Exs. 41-65, 68, 74, 76, 80, 81, 83-102; *e.g.*, Vol. 5 at 116-120, 192; Vol. 7 at 2-11, 119 194-195, 267; Vol. 8 at 40-42, 70-71), and cross-examination about whether DOL actually reviewed or relied on the forms was excluded as irrelevant (Vol. 5 at 116-117).

Footnotes

[1]"Vol. 1" refers to Volume One of the Record on Appeal. Volume 3 is the transcript of the pre-trial conference. Volumes 4 through 9 of the record on appeal contain the transcript of trial proceedings. "Supp. R." is the transcript of the sentencing. "RE." refers to the record excerpts.

[2]Neither Muse nor any other claims examiner, nor Metz (who handled the claim for FAA initially), were called in the government's case-in-chief. Metz was called as a defense witness.

[3] According to the office manager, "'[h]e asked us not to issue any payroll checks until he cleared up his situation" (Vol. 4 at 168). Excluded defense evidence would have demonstrated that even though he had been released for partial duty by a DOL doctor at the end of 2000, but DOL had not acted to restore him to work because there was no release from the primary physician at that time (R.E. at 152)(Dr. Selod)(Vol. 8 at 138).

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SUPREME COURT, U.S.

No. 06-990

In the Supreme Court of the United States

MICHAEL LEE HARMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in excluding documentary evidence offered by petitioner.

2. Whether the district court abused its discretion in admitting the testimony of a government summary witness.

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In the Supreme Court of the United States

No. 06-990

MICHAEL LEE HARMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 442 F.3d 367.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2006. A petition for rehearing was denied on October 18, 2006 (Pet. App. 27a). The petition for a writ of certiorari was filed on January 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was an air traffic controller with the Federal Aviation Administration (FAA). Pet. App. 2a. On November 25, 1996, petitioner's chair malfunctioned, causing him to fall to the floor and injure his back. Gov't

C.A. Br. 4. Petitioner was taken to the hospital and released the same day. *Ibid.*

Unable to return to work, petitioner began receiving workers' compensation benefits from the United States Department of Labor (DOL). Pet. App. 2a. Petitioner briefly returned to work in April 1997, but the pain from his injury caused him to stop working a month later. He then resumed receiving workers' compensation benefits. Gov't C.A. Br. 4; see Pet. App. 2a.

From January 11, 1997, through February 23, 2002, when petitioner next returned to work as an air traffic controller, petitioner received $359,195.82 in benefits from the Office of Workers' Compensation Programs (OWCP) at the DOL. Gov't C.A. Br. 4. The OWCP monitors the status of all benefit recipients by requiring them periodically to fill out a questionnaire known as "Form 1032." Form 1032 requests information about a recipient's income, ability, and work-related activities. *Id.* at 4-5.

While petitioner received workers' compensation benefits, he worked for a variety of for-profit and charitable aviation organizations. He served as president and chief executive officer of Amber Aviation, Inc., a for-profit corporation. Pet. App. 3a. He also served on the board of directors for Challenge Air for Kids, a non-profit organization closely associated with Amber Aviation. *Ibid.* Additionally, petitioner flew planes for two charter airline companies, IFL Group and Hall Airways. *Ibid.* Petitioner failed to disclose any of those activities on the five Forms 1032 that he submitted to the OWCP while he received benefits. *Ibid.*; see Gov't C.A. Br. 5.

2. On June 17, 2003, a federal grand jury indicted petitioner on three counts of mail fraud, in violation of

18 U.S.C. 1341, and three counts of perjury for the purpose of obtaining workers' compensation benefits, in violation of 18 U.S.C. 1920. Those counts were based on the Forms 1032 that petitioner mailed to the Department of Labor in 1999, 2000, and 2001. Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on all six counts. He was sentenced to 33 months of imprisonment and ordered to pay $354,389.61 in restitution. Pet. App. 3a.

3. The court of appeals affirmed petitioner's convictions, vacated his sentence, and remanded for resentencing. Pet. App. 1a-26a. The court first rejected petitioner's argument that the misstatements in his Forms 1032 were immaterial (*id.* at 6a-8a), explaining that "a reasonable jury could find the omissions alleged by the indictment to be material." *Id.* at 8a. The court noted that the former president of Hall Airways testified that petitioner had asked him to donate what would have been his pay to Challenge Air and Amber Aviation. *Id.* at 9a. The court also noted that the president of IFL Group, another company for which petitioner flew planes, testified that he had given petitioner a "loan" in the amount of wages to which petitioner was entitled, which "loan" the president did not expect to be paid back. *Id.* at 10a. In rejecting petitioner's related challenge to the sufficiency of the evidence against him (*id.* at 8a-11a), the court of appeals, "drawing all reasonable inferences in favor of the Government," held that "a reasonable trier of fact could conclude that [petitioner] failed to disclose material information" to the DOL as "charged in the superseding indictment." *Id.* at 11a.

The court of appeals next addressed petitioner's claim that the district court had abused its discretion in

admitting (1) a chart setting forth the dates on which petitioner had received payments and submitted the forms to the DOL, and (2) the testimony of government witness Tom Hager, who summarized the evidence that had been presented in the case. Pet. App. 11a-13a. The court held that the district court did not abuse its discretion in admitting the chart or Hager's testimony, reasoning that "[t]he evidence at issue presented an appreciable degree of complexity," which warranted the summary, and the district court correctly "gave a limiting instruction to the jury." *Id.* at 13a.

Similarly, the court of appeals determined that the district court did not abuse its discretion in refusing to admit defense exhibits and limiting petitioner's cross-examination of government witnesses with respect to the extent of his injury, his attempt to return to work, and the knowledge of the FAA and DOL that he continued to pilot airplanes. Pet. App. 14a-16a. The court of appeals concluded that, "[e]ven if [petitioner's] evidence met the minimum threshold of relevancy, its exclusion was harmless because it could not have affected the jury's determination [on] any of the charged counts." *Id.* at 15a. The court of appeals stressed that the issue before the jury was "whether [petitioner] engaged in a scheme to defraud by concealing material information in the 1032 forms submitted to the DOL," not the nature or extent of petitioner's injury. *Ibid.* The court of appeals also noted that "[t]he trial court [had] permitted [petitioner] to testify both that he told his doctors about his flying and that he believed the doctors were forwarding that information to the DOL." *Id.* at 15a-16a. The court concluded that the excluded reports that gave rise to petitioner's evidentiary challenges were "to the same effect" as petitioner's testimony, and, accordingly, any

error in excluding the evidence was harmless. *Id.* at 16a.

In a single paragraph, the court of appeals dispensed with petitioner's objection to the statement, made by the prosecutor during closing argument, that there was no evidence that petitioner's back was broken. Pet. App. 16a. Reviewing for plain error, the court concluded that, although "the prosecutor's statement appears to have been neither warranted nor relevant," petitioner had not shown that the "comment on an essentially irrelevant matter substantially prejudiced his rights or resulted in a miscarriage of justice." *Ibid.*

Finally, the court of appeals rejected petitioner's claim that the district court erred in enhancing his sentence because of his obstruction of justice. Pet. App. 17a. The court noted that there was (1) testimony at trial indicating that petitioner had told a Challenge Air executive to destroy a relevant document and (2) a statement in the pre-sentence report (PSR) that petitioner had back-dated a check to make it appear that he was repaying a loan rather than receiving a salary. *Id.* at 17a-18a. Accordingly, the court held that the district court had not erred in enhancing the sentence. *Id.* at 18a. The court did, however, agree with petitioner that the district court had miscalculated, for sentencing purposes, the amount of loss he had caused. Accordingly, the court of appeals vacated the sentence and remanded for resentencing. See *id.* at 22a.

Chief Judge Jones dissented from the majority's decision to affirm petitioner's conviction, describing it as "a very close case." Pet. App. 22a-23a. Judge Jones believed that three of the district court's challenged rulings were erroneous, and that those rulings "turned the tide" for a prosecution in which "[a] rational jury could

have found reasonable doubt about the government's case." *Id.* at 23a. She also suggested that the district court's "trial errors" were "compounded" when the prosecutor "implied, in her closing rebuttal argument, that [petitioner's] disability was fake." *Ibid.* Judge Jones therefore would have vacated petitioner's conviction and remanded for a new trial. *Ibid.*

4. Petitioner filed a petition for rehearing en banc. On October 18, 2006, the court of appeals denied that petition, with only Judge Jones dissenting. Pet. App. 27a. On remand, the district court resentenced petitioner to "time served," plus three years of supervised release, and recalculated the amount of restitution petitioner owed under the Mandatory Victim Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A, 110 Stat. 1227, to $267,953.71. Amended Judgment 2-4.

ARGUMENT

Petitioner argues that this Court should review the court of appeals' decision because it (1) conflicts with decisions of this Court affirming a defendant's right to present a complete defense (Pet. 7-17), and (2) contravenes the Federal Rules of Evidence (Pet. 17-21). Petitioner's claims lack merit.

1. Petitioner first contends (Pet. 7-17) that the cumulative effect of the district court's adverse evidentiary rulings was to deprive him of his right "to present a complete defense" (Pet. 7), in contravention of this Court's decisions in *Holmes* v. *South Carolina*, 126 S. Ct. 1727 (2006); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); and *Washington* v. *Texas*, 388 U.S. 14 (1967). See Pet. 7-12. Petitioner is mistaken.

a. As this Court recently reaffirmed in *Holmes*, "[s]tate and federal rulemakers have broad latitude un-

der the Constitution to establish rules excluding evidence from criminal trials." 126 S. Ct. at 1731 (quoting *United States* v. *Scheffer*, 523 U.S. 303, 308 (1998)). "The Constitution permits judges 'to exclude evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues.'" *Id.* at 1732 (quoting *Crane* v. *Kentucky*, 476 U.S. 683, 689-690 (1986)) (some internal quotation marks omitted).

The court of appeals in this case correctly held that the district court exercised its discretion within constitutional bounds when it excluded evidence that was, at most, marginally relevant and was merely repetitive of the testimony offered by petitioner and other witnesses at trial. See Pet. App. 15a (explaining that "[t]he jury was not required to determine whether [petitioner] actually suffered an injury or the extent of that injury" and that, even if the FAA knew about petitioner's flying activities, that knowledge would not be imputed to the DOL), 15a-16a (noting that petitioner was allowed to testify that he told his doctors he was flying and that he believed the information was being forwarded to the DOL); Gov't C.A. Br. 32 (third party testified to petitioner's "serious" injury), 33 n.4 (FAA employee testified that petitioner told the FAA he was mentally and physically ready to return to work), 35 n.5 (testimony of FAA employee indicated that both the FAA and DOL knew about petitioner's flying); Pet. 6 (acknowledging that petitioner testified about his injury, efforts to return to work, and agency knowledge that he was flying aircraft), 8 (stating that proffered documentary evidence would have "corroborated petitioner's trial testimony").

b. The cases cited by petitioner are not to the contrary. *Holmes* and *Washington* both involved challenges to State rules that arbitrarily excluded an entire category of relevant evidence. See *Holmes*, 126 S. Ct. at 1735 (holding unconstitutional rule that conditioned admission of evidence of third-party guilt on strength of State's case because "no logical conclusion c[ould] be reached regarding the strength" of the evidence of third-party guilt "by evaluating the strength of [the State's] * * * contrary evidence"); *Washington*, 388 U.S. at 22 (holding unconstitutional a state statute prohibiting defendants from calling as witnesses individuals who had been charged as principals, accomplices, or accessories in the same crime as the defendant because the rule irrationally "presume[d] * * * unworthy of belief" the potentially probative testimony of "whole categories of defense witnesses"). *Chambers* similarly involved a rule against hearsay applied "mechanistically," without an exception for declarations against penal interest, in combination with a common-law rule that prevented the defendant from impeaching his own witness. 410 U.S. at 300-301, 302; see *Scheffer*, 523 U.S. at 316 (recognizing that *Chambers* "specifically confined its holding to the 'facts and circumstances' presented in that case").

In contrast to the cases cited by petitioner, the district court here made case-specific evidentiary rulings after weighing the relevance of petitioner's proffered evidence against its potential for prejudice. Such routine evidentiary determinations, even if incorrect, are not of constitutional magnitude so long as the defendant has a meaningful opportunity to present his defense in

a fundamentally fair trial.[1] As the court of appeals held, the district court did not abuse its discretion in excluding evidence that "could not have affected the jury's determination" with respect to "any of the charged counts." Pet. App. 15a; see *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988) (A criminal defendant "does not have an unfettered right to offer testimony that is * * * inadmissible under standard rules of evidence."). And, as noted above, petitioner admits that he was allowed to testify to the matters contained in the documents he sought to admit, and that testimony was echoed by other witnesses at trial.

Petitioner thus is right to characterize his constitutional challenge as presenting "a narrow question" (Pet. App. 8 (emphasis removed)). Such a claim does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. Petitioner next contends (Pet. 17-21) that the district court erred in permitting the government to introduce the testimony of a witness who summarized the documentary evidence that had been presented at trial. Petitioner insists that it was difficult for his counsel "meaningfully to cross examine a witness with no personal knowledge concerning the events he [was] called

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[1] Indeed, the dissenting opinion in the court of appeals characterized the district court's evidentiary rulings as "trial errors" (Pet. App. 23a), not errors of constitutional dimension.

upon to relate to the jury." Pet. 17. These claims lack merit.

Like other circuits,[2] the Fifth Circuit allows the use of summary witnesses in appropriate cases. See *United States* v. *Fullwood*, 342 F.3d 409, 414 (2003) (holding that admission of summary witness testimony did not constitute reversible plain error and citing cases in which such testimony had been admitted), cert. denied, 540 U.S. 1111 (2004). "[S]ummary [testimony] serves an important purpose" in complex cases by presenting in comprehensible form the information in "voluminous records" presented to the jury. *Fullwood*, 342 F.3d at 413-414. As the court of appeals explained in this case, the evidence of petitioner's fraud "presented an appreciable degree of complexity" that made the use of a summary witness appropriate, and the district court properly "gave a limiting instruction to the jury" as required by circuit precedent. Pet. App. 13a;[3] see *United States* v. *Bishop*, 264 F.3d 535, 547 (5th Cir. 2001) (stating that summary testimony "should be accompanied by a cautionary jury instruction"), cert. denied, 535 U.S. 1016 (2002).

Petitioner does not suggest that the Fifth Circuit's practices with respect to the admission of summary-witness testimony are in conflict with those of any other circuit. Nor does petitioner explain why he could not meaningfully cross-examine the summary witness in an effort to show that the witness lacked personal knowledge of the matters about which he testified or

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[2] See, *e.g.*, *United States* v. *Swanquist*, 161 F.3d 1064, 1073 (7th Cir. 1998), cert. denied, 526 U.S. 1160 (1999); *United States* v. *Lemire*, 720 F.2d 1327, 1346-1350 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

[3] The dissent did not question the majority's analysis of petitioner's challenge to the summary witness. See Pet. App. 22a-23a.

that his summary was incorrect. See *United States* v. *Swanquist*, 161 F.3d 1064, 1073-1074 (7th Cir. 1998) (rejecting defendant's claim that he was unconstitutionally limited in cross-examining summary witness where defendant "had the opportunity to cross-examine [the summary witness] within the scope of his direct testimony" and was simply "frustrat[ed] with his inability to extract helpful testimony from an adverse witness"), cert. denied, 526 U.S. 1160 (1999).

In any event, petitioner failed to raise in either the district court or the court of appeals a constitutional ground for his challenge to the introduction of summary testimony. See Pet'r C.A. Br. 41-47; Pet'r C.A. Reply Br. 16-20; Pet'r C.A. Pet. Reh'g 10-12. This Court does not ordinarily review claims raised for the first time in a petition for certiorari, see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), and there is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

DANIEL S. GOODMAN
Attorney

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